UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re BRIAN LAM, TAMARA J. LAM, a.k.a. TAMI LAM, Debtors.	Case No. 97-50045 MMCZ Chapter 7
SEARS, ROEBUCK AND CO., A New York corporation, Plaintiff, vs. BRIAN LAM, TAMI LAM, Defendants.	Adv. No. 97-5282 MEMORANDUM DECISION AND ORDER THEREON

I. INTRODUCTION

The question before the court is whether a debt arising from the unintentional conversion of goods subject to a purchase money security interest falls within the "willful and malicious injury" exception of 11 U.S.C. § 523(a)(6). For the reasons stated below, the court finds for the Lams and holds the debt to be dischargeable.

II. STATEMENT OF FACTS

In February 1995, Brian and Tami Lam purchased a tabletop stereo from Sears, Roebuck and Company for $537.48. In November 1995, the Lams also purchased bedroom furniture from Sears for $1,609.28. In both instances, the Lams used their Sears charge account to make the purchases. Store personnel issued sales tickets for both purchases, which the Lams had signed but not read. The pre-printed tickets contained the language of a security agreement which explained that, until the charged amounts were fully repaid, the signers granted Sears a purchase money security interest in the items they purchased. The tickets, however, did not mention that resale of purchased goods without the consent of Sears was prohibited.

In March 1996, the Lams' tenancy was terminated by their landlord. The Lams sold the items they had purchased from Sears in order to obtain money for a security deposit and first and last month's rent for a new landlord. The Lams neither notified Sears nor acquired its permission for the resale. They did, nevertheless, continue to make monthly payments to Sears for these items until August 1996.

The Lams filed a Chapter 7 bankruptcy on January 3, 1997. Sears timely brought this adversary proceeding to have its remaining debt in the amount of $1,402.02 determined nondischargeable under § 523(a)(6). During the trial, Tami Lam, who graduated from high school and had attended one year of vocational college, testified that she did not read the sales tickets before signing them. She also testified that, even had she read them, she would not have understood their import. Her own words spell out the extent of her struggle, "I'm not even sure if I read it I would completely understand. I

mean, how it's written, but any---Sears has a security interest in the merchandise until paid. I mean, I---don't even understand that it's telling me you can't sell it. You know, I don't---I wouldn't have understood that anyways." No one from Sears ever informed the Lams that Sears retained a security interest in the goods. When the Lams resold the merchandise to her sister, Tami Lam testified she was not aware that she was doing anything wrong.

III. POSITIONS OF THE PARTIES

Sears argues strenuously that the signed sales tickets represent valid security agreements, giving rise to purchase money security interests in the purchased items. It is Sears' position that the Lams have committed the strict liability tort of conversion in violating the security agreements and reselling the goods. Relying on the holding of *Impulsora del Territorio Sur v. Cecchini* (*In re Cecchini*), 780 F.2d 1440 (9th Cir. 1986), Sears contends that conversion of another's property, done intentionally and without justification or excuse, constitutes a willful and malicious injury within the meaning of the exception.

A month after the trial ended, the Supreme Court issued a ruling on the proper interpretation of § 523(a)(6) in *Kawaauhau v. Geiger*, ___U.S.___, 118 S. Ct. 974 (1998), discussed below. Despite a sparse treatment of the case in its post-trial brief, it is Sears' position that *Kawaauhau* supports its argument.

The Lams claim that the sales tickets were insufficient to create a valid security interest. Even if valid security interests exist, the Lams explain that their conduct cannot be characterized as willful and malicious because of their lack of knowledge about the asserted security interests.

IV. DISCUSSION

At the heart of both arguments is the question of how the "willful and malicious" language of the exception to discharge is to be interpreted. The Supreme Court directly addressed this issue in *Kawaauhau*, concluding that "the word 'willful' in [523](a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate and intentional injury, not merely a deliberate and intentional act that leads to injury." *Kawaauhau*, 118 S. Ct. at 977. The Court declared that the language of this exception is similar to that for an intentional tort, and since for intentional torts, the actor must intend the consequences of an act, and not simply the act itself, the same rule must exist for the exception. *Id*. Finally, the Court held that "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of 523(a)(6)." *Id*. at 978. Given this interpretation of § 523(a)(6) by the Supreme Court, the issue of the validity of the security interests need not be reached.

In *Kawaauhau*, Dr. Geiger had treated Kawaauhau as his patient for a foot injury. Unfortunately, Kawaauhau's foot was eventually amputated. Kawaauhau sued Geiger for medical malpractice and received a favorable judgment of $355,000. After the trial, when Geiger filed for bankruptcy, Kawaauhau sought to have the debt declared nondischargeable under the "willful and malicious injury" exception of § 523(a)(6). The Supreme Court held that "a debt for malpractice, because it is based on conduct that is negligent or reckless, rather than intentional, remains dischargeable." *Id.* at 976.

As a result of the *Kawaauhau* decision, in order to satisfy the "willful" requirement, the creditor

must prove that the debtor acted *with intent to injure* the creditor. *See, e.g.*, *Roumeliotis v. Popa* (*In re Popa*), 140 F.3d 317 (1st Cir. 1998); *Berger v. Buck* (*In re Buck*), No. WY-98-005, 1998 WL 278845 (B.A.P. 10th Cir. June 1, 1998); *Hamilton v. Nolan* (*In re Nolan*), Nos. 97-00589, 97-10050, 1998 WL 261142 (Bankr. D. Dist. Col. April 2, 1998); *Salem Bend Condominium Assoc. v. Bullock-Williams* (*In re Bullock-Williams*), No. 97-8111, 1998 WL 281933 (B.A.P. 6th Cir. June 3, 1998). In promulgating this holding, the Court effectively overruled *In re Cecchini* and its progeny, which had previously construed the exception to require merely an intentional act that subsequently causes injury. *Compare In re Cecchini*, 780 F.2d at 1442, *with Kawaauhau*, 118 S. Ct. at 977. *See also AVCO Fin. Serv. v. Kidd* (*In re Kidd*), 219 B.R. 278, 283-84 (Bankr. D. Mont. 1998). Proof of intent must be made by a preponderance of the evidence. *See Grogan v. Garner*, 498 U.S. 279, 291 (1991).

Here, Sears has clearly not met its burden of proof. The record is devoid of any evidence showing that the Lams either desired to cause injury or believed to a substantial certainty that injury would result from selling the purchased merchandise to Tami Lam's sister. Tami Lam testified that she had not read the tickets, had not known of the existence of the security interests, would not have understood what the language of the security agreements entailed even if she had read the sales tickets, and had not thought that she was doing anything wrong. Her testimony is uncontroverted and the court finds it credible. At most it can only be said that the Lams were negligent in not reading the sales tickets. Injuries arising from negligence, however, are not sufficient for the exception to apply. *Kawaauhau*, 118 S. Ct. at 978. As there is no intent to injure demonstrated here, Sears' debt

is not excepted from discharge.

It is true, as Sears contends, that at common law, conversion is a strict liability tort. "The action for conversion rests neither in the knowledge nor [in] the intent of the defendant . . . [for] the act itself . . . is unlawful and redressible as a tort." *Moore v. Univ. of Cal.*, 51 Cal. 3d 120, 144 (1990) (*quoting Byer v. Canadian Bank of Commerce*, 8 Cal. 2d 297, 300 (1937)). The elements of a claim for conversion include only the intent to act, and not the intent to injure. Exceptions to discharge, however, are determined by Congress and must be strictly construed by the courts. *See Gleason v. Thaw*, 236 U.S. 558, 562 (1915). To qualify for the "willful and malicious injury" exception in the bankruptcy context, the creditor must prove that the debtor acted with the intent to injure. *Kawaauhau*, 118 S. Ct. at 977. This Sears has failed to do.

V. CONCLUSION

The Supreme Court has held that the "willful injury" exception to discharge requires the intent to cause the consequences of the act done, not simply the intent to do the act itself. Sears has failed to show that the Lams had the requisite intent to satisfy the exception. Intent, though not a necessary element for the strict liability tort of conversion, is a necessity for § 523(a)(6) to apply. The Lams' debt to Sears is discharged.

Dated:

UNITED STATES BANKRUPTCY JUDGE